IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 22, 2008 Session

STATE OF TENNESSEE v. RAYGAN L. PRESLEY

Appeal from the Circuit Court for Warren County
No. F-9236 Larry B. Stanley, Judge

No. M2007-02487-CCA-R3-CD - Filed August 18, 2008

The defendant, Raygan L. Presley, appeals from his three Warren County Circuit Court jury convictions of aggravated sexual battery and from that court's imposition of an effective 22-year sentence. On appeal, he claims that the evidence is insufficient, that the trial court erred in admitting evidence of defendant's inculpatory pretrial statement, and that the trial court erred in failing to apply a mitigating factor in sentencing and in imposing consecutive sentences. Upon our review, we affirm the convictions but modify the sentences by vacating the order for consecutive alignment of two of them, thus creating an effective sentence of 11 years.

Tenn. R. App. P. 3; Judgments of the Circuit Court Affirmed as Modified

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Donald Capparella, Nashville, Tennessee; and John Partin and Steven Roller, McMinnville, Tennessee, for the appellant, Raygan L. Presley.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Lisa Zavogiannis, District Attorney General; and Tom Miner, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The convictions emanate from charges that the defendant had sexual contact in 2002 with the victim, his stepdaughter who was born April 25, 1995.[1]

At trial, the victim's mother, who was married to the defendant in 2002, testified that in June 2002 the victim told her that the defendant had sexually assaulted her. The victim's mother

[1] Following policy of the court, we will not identify by name a minor victim of a sexual assault.

testified that she took the victim to a physician to be examined. She then forced the defendant to leave the marital home but did not immediately seek intervention by the authorities.

The victim, who was 12 years old at the time of the 2007 trial, recounted that after watching a scary movie one night in the summer following her first-grade year in school, she had nightmares and went to her mother's bed, which her mother shared with the defendant. In the morning, the victim's mother rose before the defendant to go to work. The victim testified that after her mother left for work, the defendant started "tickling" her. She laughed, and then he "tickled [her] between the legs." The victim testified that she stopped laughing and "moved away." She testified that the defendant apologized and told her that if she were going to tell about the touching, he would leave the home.

On a second night when nightmares prompted the victim to go to her mother's bed, she was awakened the next morning by the defendant touching her "between the legs." She testified that the defendant was "rubbing" her "private part." The victim cried and retreated to her room. She testified that the defendant followed her and told her that "if [she] told anybody that [she] was going to start a fire and that it was going to be very hard to put it out."

The victim testified that the third assault occurred when the defendant came to the victim's bedroom one morning after the victim's mother had gone to work. She testified that the defendant "got under [her] covers and [her] started touching me again." She testified that the defendant put his hand "down [her] pants."

The victim testified that soon after this third incident, she told her mother about the abuse and was taken to the doctor for an examination.

Doris Denton, an employee of the Tennessee Department of Children's Services who held a master's degree in psychology and had been trained to deal with child sexual abuse, testified that she spoke with the defendant in 2002 after the defendant called for an appointment. The defendant told Ms. Denton that his stepdaughter had accused him of touching her in her "woman spot." Ms. Denton testified that the defendant said "he might have done it. He didn't know. The only explanation could have been when he was sleeping."

Ms. Denton then went to the victim's school to interview the victim. Ms. Denton testified that the victim told her that the defendant had touched her on her private part. On cross-examination, Ms. Denton agreed that the victim did not tell her about the defendant's "tickling" her or about the defendant's assaulting the victim in her bedroom.

Stan Marlar, a private investigator, testified for the State that the defendant came to him on July 26, 2002, and stated that his wife had accused him of having a sexual affair with a mutual friend of theirs, whose given name as told by the defendant is the same name as the victim's. Mr. Marlar testified that the defendant admitted having sex with this individual, using the same name

as the victim's given name. Mr. Marlar testified that the defendant did not mention that the person to whom he had referred was a minor or was his stepdaughter.

Jason Rowland, a Warren County deputy sheriff, testified that he was an investigator with the district attorney general's office when he interviewed the defendant. He testified that the defendant initially denied any improper contact with the victim but that later in the interview, when asked whether he could have touched the victim accidentally, the defendant acknowledged that he could have done so. Deputy Rowland testified that the defendant said, "[I]f [the victim] said I did this, I probably did it." Otherwise, Deputy Rowland testified on cross-examination, the defendant denied any improper touching of the victim.

Doctor Jack Rhody, a Smithville physician, testified on behalf of the defendant that he examined the victim on June 15, 2002. Doctor Rhody testified that the victim's mother related to him that an examination was needed because the victim's stepfather had been touching her. The history related by the victim recounted no "rubbing" of her vagina, and the physical examination of the victim revealed no indication that she had been vaginally assaulted.

Based upon the foregoing evidence, the jury convicted the defendant of three counts of aggravated sexual battery.

I. Timeliness of Motion for New Trial

Our first task in this case is to address the State's claim that we lack jurisdiction over the claim that the trial court erroneously allowed Mr. Marlar to testify about statements the defendant made to him following Mr. Marlar's administration of a polygraph examination. In his motion for new trial, the defendant addressed this issue, in addition to his claim of insufficiency of the evidence and of sentencing errors. The State claims that the motion for new trial was untimely and that, accordingly, the evidentiary issue is not justiciable on appeal.

Following a May 1, 2007 trial and the jury's guilty verdicts on three counts of aggravated sexual battery, the trial court, by order dated May 29, 2007, declared the defendant's findings of guilty and set the sentencing hearing for June 27, 2007. On July 3, 2007, following the sentencing hearing, the trial court entered conviction judgments which imposed three 11-year sentences with partially consecutive alignment, yielding an effective sentence of 22 years at 100 percent of service in the Department of Correction. On July 11, 2007, the trial court entered three conviction judgments that were substantially identical to the July 3, 2007 judgments. On August 9, 2007, the defendant filed his motion for new trial, alleging *inter alia*, that the trial court erred in allowing Mr. Marlar's testimony. On October 2, 2007, the trial court entered an order overruling the motion for new trial, and on October 22, 2007, the defendant filed his notice of appeal.

The judgments entered on July 11 do not purport to amend or correct the judgments entered on July 3. In his reply brief, the defendant asserts that, as shown by nuances in the trial judge's signatures, the set of judgment forms entered on July 11 were newly printed forms from

those entered on July 3. We discern no differences in content between the duplicated forms, except that the July 3 forms do not bear any signatures of defense counsel and the July 11 forms do. In his reply brief, the defendant asserts that his counsel "was never made aware of the earlier verdict form" until the issue was raised by the State in its appellate brief.

A motion for new trial must be made in writing or reduced to writing within thirty days of the "date the order of sentence is entered." Tenn. R. Crim. P. 33(b). We stress that this provision is mandatory, and the time for the filing cannot be extended. Tenn. R. Crim. P. 45(b); *State v. Martin*, 940 S.W.2d 567, 569 (Tenn. 1997). Furthermore, the appellate court is precluded from considering any issue raised in an untimely motion for new trial for which the remedy is a new trial. Tenn. R. App. P. 3(e). In the present case, the claim of an untimely motion for new trial affects only the evidentiary issue, not the issues of sufficiency of the evidence and sentencing.

To adjudicate the State's claim that this court lacks jurisdiction over the evidentiary issue, we must first determine the effect of the entry of the July 11 judgments. The universe of possibilities is not that large; in reality, to have *any* effect, the July 11 judgments necessarily either (1) amended or (2) vacated the July 3 judgments. We look at these two possibilities in turn.

We have no doubt that a trial court may amend or correct a judgment within 30 days of its entry and before a notice of appeal is filed. *See State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn. 1996) ("*Once the trial court loses jurisdiction*, it generally has no power to amend its judgment.") (emphasis added). By definition, an amended or corrected judgment operates upon the existing judgment. The result is that an amendment or correction to a judgment generally does not restart the time for filing a tolling motion such as a Rule 33 motion for a new trial or, as the case may be, a notice of appeal. Because the defendant in the present case filed his motion for new trial more than 30 days after the July 3 judgments were filed, viewing the July 11 judgments as amendments or corrections avails the defendant nothing.

Next, we have considered whether the effect of the July 11 judgments was to vacate the earlier judgments and substitute the new versions. This interpretation of the trial court's actions, however, runs headlong into *State v. Turco*, 108 S.W.3d 244 (Tenn. 2003). In *Turco*, our supreme court considered the trial court's attempt to vacate its conviction judgment as a means of altering the disposition of Turco's case from one of probation to judicial diversion. We note that, in *Turco*, the trial court's effort to vacate the conviction judgment occurred during the time in which that court retained jurisdiction over the case; a motion for new trial had been filed within 30 days of the entry of the conviction judgment. *See id.* at 245. Despite the trial court's apparent jurisdiction over the case, the supreme court ruled that the trial court was not empowered to vacate its judgment. *Id.* at 248. The court suggested that the trial court could take that action only "in appropriate circumstances," when prompted by enabling rules such as Tennessee Rules of Criminal Procedure 32(f) and 33. *Id.* The result in *Turco* was that "the trial court did not have statutory authority for ordering judicial diversion after an adjudication of guilt or imposition of sentence" because the trial court's attempt to vacate the judgment was a nullity. *Id.* Consequently, in the present case, we believe we are constrained to hold that, even if we could construe the July 11 judgments in the

present case as vacating and supplanting the July 3 judgments, the trial court was not empowered to take that action *sua sponte* and outside the ambit of enabling rules.

Although we acknowledge a certain appeal of equity in the defendant's position, we believe we have exhausted the legal possibilities for extending relief. If nothing else, an appellate court's taking jurisdiction from a trial court is governed by rather fastidious rules of law. Accordingly, we hold that the August 9, 2007 motion for new trial was untimely, and as a result, we lack jurisdiction to review the evidentiary issue.

We note that the ineffectual motion for new trial and the resulting order overruling the same led to the notice of appeal being untimely; the defendant filed the notice of appeal more than 30 days from the entry of the judgments. *See* Tenn. R. App. P. 4(a). On this issue, however, the law imparts some leeway in criminal cases. Tennessee Rule of Appellate Procedural 4(a) provides that the notice of appeal in criminal cases is not jurisdictional for the appellate court, which can waive the timely filing of the notice in the interest of justice. Given the defendant's explanation for the timing issues, the interest of justice demands that we waive the timely filing of the notice of appeal, and accordingly, we will address the issues of sufficiency of the evidence and sentencing.

II. Sufficiency of the Evidence

The defendant claims that the evidence did not sufficiently show that he touched the victim's genitalia or that, if he did, that he did so other than accidentally. The defendant is particularly aggrieved that he was convicted of aggravated sexual battery with respect to the episode first described by the victim.

When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92 (1979); *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003). The rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *Winters*, 137 S.W.3d at 654.

In determining the sufficiency of the evidence, this court should neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Id.* at 655. Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). This court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id.*

"Aggravated sexual battery is unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances: . . . The victim is

less than thirteen (13) years of age." T.C.A. § 39-13-504(a)(4) (2003). Aggravated sexual battery is a Class B felony. *Id.* § 39-13-504(b).

> "Sexual contact" includes the intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification.

Id. § 39-13-501(6).

We disagree with the defendant's claim that the evidence failed to establish the elements of aggravated sexual battery. We recognize that the victim's descriptions of one or two of the assaults may serve to inform the analysis of the presence of the offense elements in the analysis of the other assault or assaults. In that vein, we recall that the victim testified that in the first incident, the defendant touched her between her legs. When the victim stopped laughing and moved away, the defendant apologized but admonished the victim not to tell anyone about the incident. After the victim described a second episode of the defendant's touching her between her legs, she specified the area between her legs as her "private part," which she further specified as "a place no one is supposed to touch or see but me." In the third incident, the defendant "put his hands down [the victim's] pants," and the victim again referred to his touching her "[b]etween the legs." Additionally, Ms. Denton testified that during her interview of the victim, the victim stated that the defendant touched her in the vaginal area, which the victim referred to as her "tutu."

Based upon these characterizations of the multiple contacts the defendant had with the victim, we conclude that a reasonable jury could have found all of the elements of three counts of aggravated sexual battery beyond a reasonable doubt, as did the jury in the present case.

III. Sentencing

The defendant claims that the trial court erred in imposing 11-year sentences and in ordering that one such sentence run consecutively to the concurrent aggregate of the other two sentences. The defendant was sentenced pursuant to the sentencing law in effect prior to the 2005 "*Blakely*" amendments to the sentencing code.

Prior to trial, the defendant filed a claim of sentence mitigating factors – that his conduct neither caused nor threatened serious bodily injury and that the defendant had a "history of sustained employment, indicating a strong work ethic." *See* T.C.A. § 40-35-113(1), (13) (2003). Prior to sentencing, the State filed a claim of sentence enhancement factors – that the defendant had a previous history of criminal convictions or behavior in addition to that necessary to establish his sentencing range and that he used a position of public or private trust in a manner that significantly facilitated the commission of the offense. *See id.* § 440-35-114(1), (14).

In the sentencing hearing, the victim's mother testified the victim, at one point, told her that the victim had no desire to ever marry or to have children, but the victim's mother did not clearly relate this expression to the defendant's actions. According to her mother, the victim also expressed fear that her peers would discover that she had been the victim of sexual assaults. The victim's mother agreed, however, that she did not take the victim to counseling and that, after a year had passed, the victim "seemed to be okay." The victim's mother testified that she never reported the abuse to any official agency and that the defendant himself had reported the victim's claims to the Department of Children's Services.

Probation officer Donna Dunlap testified that, in response to her presentence investigative questionnaire, the defendant stated, "I have done nothing wrong. I am innocent and wrongly convicted." Ms. Dunlap recounted the defendant's prior record of criminal convictions, which included convictions in 2001 of vandalism, in 1998 of two counts of sale of a Schedule VI controlled substance, and of minor traffic offenses. Ms. Dunlap testified that the defendant told her that he had a drug problem, which began at age 11 and included the use of "Hydrocodone, pot, cocaine, LSD, and meth." Ms. Dunlap agreed that the defendant had remained steadily employed.

Doctor Kenneth Anchor, a psychologist and certified sexual offender service provider in Tennessee, testified that he tested the defendant to determine whether the defendant was a chronic sexual offender. He testified that the tests revealed "no indication that [the defendant] had a physical or sexual interest in minors of either sex" and that "the tests confirmed" that the defendant had never "experienced arousal with minors of either sex." In summary, Doctor Anchor opined that the defendant did not "appear to have the profile of what we would call a pedophile or a sexual deviant." He further opined that the defendant was "in a low risk category" for re-offending. On cross-examination, Dr. Anchor admitted that he tested the defendant three years after the offenses occurred and that his test results might have been different had he tested the defendant three years earlier.

Robert Presley, the defendant's father, testified that his vocation was repairing cotton gins and that he employed the defendant in this highly specialized business.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2003). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the defendant. *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id.* If appellate review reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The mechanics of arriving at an appropriate sentence are spelled out in the Criminal Sentencing Reform Act of 1989. At the conclusion of the sentencing hearing, the trial court determines the range of sentence and then determines the specific sentence and the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b) (2003); -103(5); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

As Class B felonies, the aggravated sexual battery convictions in the defendant's case are sanctioned by a sentencing range of a minimum of eight years and a maximum of 12 years. *See* T.C.A. § 40-35-112(a)(2) (2003). At the time of the offenses in the present case, the "presumptive sentence for a Class B . . . felony [was] the minimum sentence in the range." *Id.* § 40-35-210(c).

A. Length of Sentence

In the present case, the trial court, in enhancing each sentence to 11 years, utilized only the defendant's history of criminal convictions or behavior. *See id.* § 40-35-114(1). The trial court afforded weight to the mitigating factor that the defendant evinced a "relatively strong work ethic," *see id.* § 40-35-113(13), but the court assigned no weight to the claimed mitigating factor that the defendant's actions neither caused or threatened bodily injury, stating that a minor's "emotional bodily injury and emotional trauma is always very seriously threatened" by sexual abuse of the minor, *see id.* § 40-35-113(1).

We see no basis in the record for altering the individual sentences imposed by the trial court. That court obviously gave significant, but justifiable, weight to the enhancement factor of the defendant's record of criminal convictions and history of criminal behavior. The court did apply the mitigating factor that the defendant had attained a stable work history. Although the trial court did not afford any weight to the claim that the sentences should be mitigated due to the lack of a threat or occurrence of any serious bodily injury to the victim, we conclude that this mitigating factor merited little, if any, weight. "Psychological and emotional injuries qualify as 'serious bodily injury' in this context," *State v. Robert Linder*, No. E2004-02848-CCA-R3-CD, slip op. at 9 (Tenn. Crim. App., Knoxville, Sept. 22, 2006), *perm. app. denied* (Tenn. 2007), and the victim's mother testified to some, although slight, emotional impact on the victim as a result of the defendant's assaults. All in all, we defer to the presumption of correctness of the length of the sentences and affirm the imposition of 11-year sentences.

B. Consecutive Sentencing

Finally, the defendant challenges the trial court's partial use of consecutive sentencing to forge an effective 22-year sentence, which is mandated to be served at 100 percent. *See* T.C.A. § 40-35-501(i)(1), (2)(H).

Consecutive sentencing, as it was used in the present case, must be – and was – premised upon Tennessee Code Annotated section 40-35-115(b)(5), which authorizes consecutive alignment of sentences when

> [t]he defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims . . . .

T.C.A. § 40-35-115(b)(5). A trial court may apply factor (5) if the record supports a finding of that factor's factual considerations by a preponderance of the evidence. *See id.* "Sentences shall be ordered to run concurrently, if the criteria noted in [Tennessee Code Annotated section 40-35-115(b)] are not met, unless consecutive sentences are specifically required by statute or the Tennessee Rules of Criminal Procedure." *Id.* § 40-35-115(d). The operative language of Code section 40-35-115(b)(5) originated in *State v. Taylor*, 739 S.W.2d 227 (Tenn. 1987), and was later codified in the 1989 Sentencing Act. In *Taylor*, our supreme court cautioned "that consecutive sentences should not routinely be imposed in sexual abuse cases . . . and that the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved." *Id.* at 230. Similarly, the Sentencing Act provides that "[e]very defendant shall be punished by the imposition of a sentence justly deserved in relation to the seriousness of the offense." *Id.* § 40-35-102(1). Similarly, Code section 40-35-103 provides that sentences "should be no greater than that deserved for the offense committed" and "should be the least severe measure necessary to achieve the purposes for which the sentence is imposed." *Id.* § 40-35-103(2), (3). In *Gray v. State*, 538 S.W.2d 391 (Tenn. 1976), our supreme court held that consecutive sentencing should only be imposed after a finding that extended confinement "is necessary to protect the public from further criminal conduct by the defendant." *Id.* at 393. The holding in *Gray*, like that in *Taylor*, was later codified in the 1989 Act.

In applying Code section 40-35-115(b)(5), the trial court analyzed the considerations enumerated in that factor. The court found it "troublesome that [the defendant] . . . was the adult that was to supervise [the victim]" and that the defendant abused a position of trust in sexually assaulting the then seven-year-old victim. The court, however, acknowledged that the time span of the offending activity was not very long. The judge disagreed with defense counsel's characterization that the sexual contact could not have been more "benign." The court opined that the defendant's

touching the victim's skin inside her clothing was more egregious than had he touched her through her clothing. The judge stated, "It could have been not so bad, but it could have been worse." The court then expressed its view that the victim experienced residual mental or emotional damage based upon the victim's fears that her peers might learn that she was the victim of sexual assaults. The court concluded that the considerations listed in section 40-35-115(b)(5) warranted the consecutive alignment of two of the 11-year sentences.

We encounter difficulty with the use of consecutive sentences in the present case on two levels. First, the record preponderates against the finding of the consideration that the victim suffered "residual, physical and mental damage." *See id.* § 40-35-115(b)(5). According to the preparer of the presentence report, no victim impact statement was offered. Moreover, the victim's mother's testimony in the sentencing hearing showed that, although the victim was fearful of her peers learning that she had been sexually assaulted, the victim's mother did not pursue counseling for her daughter and opined that the victim "seemed okay." Second, the court acknowledged that the time span of the three assaults was not long and that the nature of the assaults, though serious and not "benign," could "have been worse." We, too, acknowledge that offenses of aggravated sexual battery may indeed be more egregious than those perpetrated by the defendant. *See*, e.g., *State v. John Ramsey Duncan*, No. M2005-01431-CCA-RM-CD, slip op. at 3 (Tenn. Crim. App., Nashville, Jan. 30, 2008) (reciting that instances of aggravated sexual battery in the case included the defendant making the nine-year-old victim "take her clothes off in the bathroom [when the d]efendant was also nude [and when the d]efendant then made [the victim] get on her knees and touch his 'private' with her hand and 'go up and down,'" as well as the defendant's making the victim "bend[] over in the bathroom while Defendant rubbed his penis on her buttocks"); *State v. Gregory Lee Smith,* No. W2006-01962-CCA-R3-CD, slip op. at 1-2 (Tenn. Crim. App., Jackson, Oct. 26, 2007) (holding that evidence was sufficient to support the defendant's conviction of aggravated sexual battery by showing that the defendant "removed [the 14-year-old victim's] clothes and threw her to the floor. Defendant attempted to penetrate [her] vaginally with his penis and was successful for a short time. Defendant then began biting [the victim] on the vaginal area."); *State v. Eric James Osborne*, No. M2006-00888-CCA-R3-CD, slip op. at 2-3 (Tenn. Crim. App., Nashville, Aug. 28, 2007) (stating that the evidence established aggravated sexual battery via "'the defendant rubb[ing] his penis over the genitals of [the eight-year-old victim] while she was on the couch in the living room of the defendant's apartment in Hermitage'"). Unquestionably, the defendant's relationship with the victim – that of stepfather and caretaker – exacerbated the crimes, but we are constrained to acknowledge that the other factor (5) considerations tend to weigh in favor of the defendant. As a result, our review of the imposition of consecutive sentences is de novo with no presumption of correctness.

Upon our de novo review of the consecutive sentencing order, we are constrained to assure that the effective sentence was the least severe measure appropriate to accomplishing the purposes of the sentencing law and that it is, in a word, proportionate to the offenses. *See* T.C.A. §§ 40-35-102(1), -103(2), (3). "[T]he 1989 Act requires the [sentencing] court to insure that the aggregate sentence imposed should . . . bear some relationship to a defendant's potential for rehabilitation." *State v. Desirey*, 909 S.W.2d 20, 33 (Tenn. Crim. App. 1995). In this case, the record establishes that the defendant's potential for rehabilitation weighs against the imposition of

consecutive sentences. Doctor Anchor testified that the defendant exhibited none of the traits of a sexual predator and that his risk to re-offend was low. In addition, the presentence report established that the defendant had a steady work history and a minor record of criminal activity. We likewise cannot ignore the fact that the defendant's crimes disqualified him from Range I release eligibility of 30 percent and placed him under a statutory mandate to serve 100 percent of his sentence.

Based upon all of the considerations that we have mentioned, we hold that the imposition of consecutive sentencing was not supported in the record in the present case. We therefore vacate the consecutive sentencing order. Pursuant to the terms of Tennessee Code Annotated section 40-35-115(d), the 11-year sentences shall run concurrently.

IV. Conclusion

In consequence of the above analyses, we affirm the defendant's convictions, but we modify his sentences by eliminating the order for consecutive service.

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JAMES CURWOOD WITT, JR., JUDGE